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No. 88-1504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHELLE M. ETLIN,
Petitioner,

v.

VLADIMIR N. ETLIN,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. (a) Was there sufficient evidence to support the trial court's finding that it had jurisdiction to determine Daniel's custody, where the ex-wife, Michelle M. Etlin, willfully absconded with the four year old child of the parties in October 1982 and remained secreted until being discovered in August of 1986.

(b) Is there a federal question as to the applicability of the Parental Kidnapping Prevention Act (PKPA) where the state laws of Virginia controlled continuing jurisdiction of Virginia's Circuit Court and custody questions and when the evidence was sufficient to support jurisdiction?

2. Can the Petitioner be heard here in reference to her contempt conviction when she has failed to perfect her appellate rights?

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BRIEF IN OPPOSITION

STATUTORY PROVISIONS

In addition to The Parental Kidnapping Prevention Act of 28 USC §§ 1738A, set forth in the petition, this case also involves:

Virginia Code Section 20-108:

> § 29-108. Revision and alteration of such decrees. —The court may, from time to time after decreeing as provided in § 20-107.2, on petition of either of the parents, or on its own motion or upon petition of any probation officer or superintendent of public welfare, which petition shall set forth the reasons for the relief sought, revise and alter such decree concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require. No support order may be retroactively modified, but may be modified with respect to any period during which there is a pend-

ing petition for modification, but only from the date that notice of such petition has been given to the responding party.

Virginia Code Section 20-126(A)(2) in pertinent part:

§ 20-126(A)(2). Grounds for jurisdiction.—It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present and future care, protection, training, and personal relationships.

Virginia Code Section 19.2-318:

§ 19.2-318. Appeal on writ of error to judgment for contempt.—From a judgment for any civil contempt of court an appeal may be taken to the Court of Appeals. A writ of error shall lie from the Court of Appeals to a judgment for criminal contempt of court. This section shall also be construed to authorize an appeal from or writ of error to a judgment of a circuit court rendered on appeal from a judgment of a district court for civil or criminal contempt.

Virginia Code Section 19.2-320:

§ 19.2-320. Petitioner for writ of error to comply with Rules of Court.—Any party for whom a writ of error lies may apply therefor by complying with the provisions of the Rules of the Supreme Court of Virginia relative to the appeal of criminal cases to the Court of Appeals, or where an appeal is taken to the Supreme Court, with the Rules of the Supreme Court relative to appeal of criminal cases to the Supreme Court.

Virginia Code Section 19.2-321:

§ 19.2-321. With whom petition for writ of error filed.—A. The petition to the Court of Appeals shall be filed with the clerk of the Court in the manner and within the time provided by law.

B. The petition in a case wherein a writ of error lies from the Supreme Court shall be filed with the clerk of that Court in the manner and within the time provided by law.

Oregon Revised Statutes (ORS) Section 109.780:

§ 109.780. Effect of wrongful conduct of petitioner. (1) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct, the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(2) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(3) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorney fees at trial and on appeal, incurred by other parties or their witnesses.

Oregon Revised Statutes (ORS) Section 109.830:

§ 109.830. Enforcement of decree of another state. The court of this state shall recognize and enforce an initial or modification decree by a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with ORS 109.700 to 109.930 or which was made under factual circumstances meeting the jurisdictional standards of ORS 109.700 to 109.930, so long as this

decree has not been modified in accordance with jurisdictional standards substantially similar to those of ORS 109.700 to 109.930.

STATEMENT OF THE CASE

This is a civil case in which the Circuit Court of Fairfax County, Virginia, held hearings on the custody of Daniel Etlin and on the contempt of the mother, Michelle Etlin, for abducting in 1982 the four year old child of the parties, and remaining in hiding until found by the father four years later. After three days of hearings, the Court entered an order dated March 25, 1987 awarding custody to the father. The Court of Appeals of Virginia affirmed on April 24, 1980 and denied application for rehearing on June 24, 1988. The Supreme Court of Virginia denied the petition for review on December 14, 1988. (Petitioner's Petition, p. 3). The Petitioner (mother) now files the Petition for Writ of Certiorari to this Court.

SUMMARY OF ARGUMENT

1. Virginia has jurisdiction to determine custody of this minor child. In accordance with Code Section 20-126(A)(2), the evidence found in the record, contained in the three days of hearings in Fairfax County Circuit Court, culminating in an order dated March 25, 1977, was sufficient to support the trial court's finding that the Virginia courts had jurisdiction to hear this matter and so found by the Court of Appeals of Virginia. Additionally, the Court has continuing jurisdiction over its initial decrees under the Virginia Code § 20-108.

2. Under Virginia Code § 19.2-318, 320 and 321 a criminal contempt conviction must be brought before the Court of Appeals by a Petition for Writ of Error. The Petitioner never sought a Petition for Writ of Error. The Code Sections 19.2-318, 320 and 321 are substantive and not just procedural.

ARGUMENT

1. The Circuit Court of Fairfax County had jurisdiction to try this case on its merits, and the Court of Appeals of Virginia so found in its written opinion of April 6, 1988.

Under the Virginia Code § 20-108, the Virginia courts have continuing jurisdiction in matters on which they have previously ruled. Such was the situation in *Etlin v. Etlin*. Under Code Section 20-126(A)(2) the Virginia court retains modification jurisdiction even when the child no longer lives in the state. *Kern v. Lindsey*, 30 S.E. 2d 707, 182 Va. 778 (Va. 1944). Modification jurisdiction continues as long as the elements contained in Virginia Code § 20-126(A)(2) are present. That Code section provides that a court is competent to decide child custody matters and has jurisdiction to make child custody determinations if:

> "It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships . . ."

The Circuit Court of Fairfax County and the Court of Appeals agreed that there were significant connections with this State and that Virginia was the proper state in which this hearing should be conducted. The father, Vladimir N. Etlin, has always resided in the State of Virginia and continues to reside there. The Petitioner, Mrs. Etlin, had been a Virginia resident, then moved to Maryland while the earlier divorce proceedings were in progress in the Circuit Court of Fairfax County, Virginia, before she surreptiously disappeared from the Met-

ropolitan area entirely in 1982 with the child, Daniel Etlin.

That child, Daniel Etlin, was born in Virginia and lived the early part of his life in Virginia. Moreover, the child's paternal grandparents and many other relations live in Virginia.

Starting in 1980, the parties litigated custody, support and issues relating thereto, as well as obtaining their final decree of divorce from each other in the County of Fairfax, State of Virginia. This process was over two years in the making before her abduction of Daniel.

Mr. Etlin now has physical custody of Daniel Etlin and lives in Fairfax County, Virginia. Moreover, much of the evidence relating to the child's present or future care, protection, training and personal relationships is found in the State of Virginia.

These connections support the Court's jurisdiction in this case. *Meade v. Meade*, 812 F.2d 1473 (4th Cir. 1987).

Under the Uniform Child Custody Jurisdiction Act of Oregon (UCCJA), ORS 109.700, *et seq*, and The Parental Kidnapping Prevention Act (PKPA), 28 USC § 1738A, Oregon could not retain jurisdiction of this case. The public policy of these laws, as well as the UCCJA of Virginia, are designed to prevent the absconding parent from forum shopping and benefiting from their own wrongdoing.

Judge Redding of the Circuit Court of Multnomah County in Oregon, after consultation with Judge F. Bruce Bach of the Fairfax County Circuit Court, also agreed that Virginia has jurisdiction in this matter and sent the case back from Oregon to Fairfax County, Virginia for trial. (Petitioner's Appendix Vol I pp. 183-197 of conversation on 2/17/87).

Clearly, Virginia had jurisdiction in this matter, and the decision below was correct.

2. The Court of Appeals of Virginia found that the mother's contempt conviction was not properly before the Court. Virginia Code Section 19.2-318 provides that an appeal from a judgment of criminal contempt must be sought by a Petition for Writ of Error. No such Petition was filed and the Court of Appeals would not consider the merits of the issue.

Code Section 19.2-318:

> "From a judgment for any civil contempt of court an appeal may be taken to the Court of Appeals. A Writ of Error shall lie from the Court of Appeals to a judgment for criminal contempt of court . . ."

Further Code Section 19.2-320 provides:

> "Any party for whom a Writ of Error lies may apply therefor by complying with the provisions of the rules of the Supreme Court of Virginia relative to the appeal of criminal cases to the Court of Appeals, or where an appeal is taken to the Supreme Court, with the rules of the Supreme Court relative to an appeal of criminal cases to the Supreme Court."

And Code Section 12.2-321:

> "A. The petition to the Court of Appeals *shall* [emphasis added] be filed with the Clerk of the Court in the manner and within the time provided by law."

As these Code sections make clear, the Petitioner waived her right to file for a Writ of Error, and therefore as the Court of Appeals so found the issue of her criminal contempt was not considered.

Petitioner failed to perfect her State Appellate rights.

CONCLUSION

The Respondent in this case asks that the Petition for a Writ of Certiorari be denied and that Respondent be awarded his costs and damages.

Respectfully submitted,

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